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Uncounseled Convictions and Sentencing Enhancements: Does *Nichols v. United States* Do More Than Simply Overrule *Baldasar*?

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I. INTRODUCTION

Although a personal right,[1] the assistance of counsel has come to be acknowledged as an essential requisite to the establishment of criminal culpability. The essence of Sixth and Fourteenth Amendment based jurisprudence, with regard to one's right to counsel, is a recognition of the function a trained advocate plays in our adversarial judicial system. The attorney demands payment of the client's "due bill," issued by the government under mandate of constitutional or statutory provision, to each of her citizens. Retained or appointed counsel helps provide the measure of reliability justifying a constitutional acceptance of a resulting conviction because this "fundamental fairness" has accompanied the process. Therefore, ever since the United States Supreme Court officially abandoned the "special circumstances"[2] approach to one's constitutional guarantee of counsel at

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1. Faretta v. California, 422 U.S. 806, 819 (1975).

2. Between 1932 and 1963, any federal accommodation to questions involving a request for counsel arising in the state arena was grounded on due process under a "special circumstances" analysis. This approach called for a subjective appraisal of the totality of the circumstances, primarily focused upon the abilities of the

trial in 1963, absent a valid waiver, failure to appoint counsel in a felony prosecution results in an invalid conviction.[3]

However, the Sixth Amendment has never been held to preclude trial of an indigent accused of a misdemeanor who has requested and been refused appointment of counsel. The federal prohibition in this context simply forbids, at sentencing, the imposition of incarceration or "jail time."[4] Absent a sanction involving loss of one's physical liberty, any resulting conviction is not rendered constitutionally invalid solely because an attorney has not been provided. Hence, the soundness of an initial misdemeanor conviction, when judged by a right to counsel test, depends upon whether or not one is sentenced to jail.

Leaving to one side the issue as to whether this line of demarcation has been properly drawn, once in place it presents a relatively easy standard to apply, at least as to the initial conviction. Before the Court's 1994 holding in *Nichols v. United States*[5] when inquiry turned to the collateral use of the uncounseled misdemeanor adjudication as a predicate offense for purposes of sentence enhancement, the clarity disappeared. To suggest that case law addressing the question was "not in harmony"[6] was an understatement of classic proportion. The degree to which the uncertainty developed was directly attributable to one United States Supreme Court decision, *Baldasar v. Illinois*.[7] That case was intended to specifically address the impact of an initial uncounseled misdemeanor conviction on penalty enhancement for subsequent offenses. Because the per curiam opinion in *Baldasar* provided no majority rationale for its result, the interpretation of its holding spawned no less than four differing and contradictory responses from the lower courts. Now, seven years after a member of the Court acknowledged that its holding had "led to uneven application . . . and conflicting decisions in the courts below,"[8] Chief Justice Rehnquist,

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defendant and the complexity of the case against him, to glean whether or not fundamental fairness had been violated by the state's denial of counsel. *See* Gideon v. Wainwright, 372 U.S. 335, 349-52 (1963) (Harlan, J., concurring).

3. *Id.* at 344. *See also* United States v. Tucker, 404 U.S. 443, 448 (1972) (holding that consideration of a prior uncounseled felony conviction is improper for purposes of sentence enhancement); Burgett v. Texas, 389 U.S. 109, 114-15 (1967) (holding that use of an uncounseled felony conviction for purposes of recidivist statute is not allowed).
4. Scott v. Illinois, 440 U.S. 367, 373-74 (1979).
5. 114 S. Ct. 1921 (1994).
6. This was one characterization found in State v. Wilson, 684 S.W.2d 544, 547 (Mo. Ct. App. 1984).
7. 446 U.S. 222 (1980).
8. Moore v. Georgia, 484 U.S. 904, 905 (1987) (White, J., dissenting from denial of certiorari).

writing for himself and four other members[9] of the Court, has "overrule[d]" *Baldasar*.[10] The majority in *Nichols* decided it was indeed consistent with the Sixth and Fourteenth Amendments to allow a defendant's previous uncounseled misdemeanor conviction for which no initial jail sentence was imposed to be used to enhance punishment upon a subsequent conviction.[11] In other words, that which is valid in the first instance retains that status for collateral purposes as well.

Nichols is an important decision in its own right, given the conflicting assessments of *Baldasar* made by the lower courts and given that every state as well as the federal government has *at least* one statute or other provision calling for an increased sentence upon proof that the accused has a previous misdemeanor conviction.[12] But there is also significance in the analysis the Court used to reach its conclusion. On the surface, it appears to be simply a consistency of treatment between the valid and invalid, be it a predicate of felony or misdemeanor. However, as this Article will demonstrate, the reasoning of

9. Justices O'Connor, Scalia, Kennedy, and Thomas joined with the Chief Justice. Justice Souter filed an opinion concurring in the judgment and Justices Blackmun, Stevens and Ginsburg dissented.

10. Nichols v. United States, 114 S. Ct. 1921, 1928 (1994).

11. *Id.*

12. ALA. CODE § 32-5-312 (1989); ALASKA STAT. § 28.35.030 (1989); ARIZ. REV. STAT. ANN. § 13-604 (West Supp. 1994); ARK. CODE ANN. § 5-65-111 (Michie 1987); CAL [VEH.] CODE § 23165 (West Supp. 1993); COLO. REV. STAT. ANN. § 42-4-1202 (West 1990); CONN. GEN. STAT. ANN. § 14-227a (West Supp. 1994); DEL. CODE ANN. tit. 21, § 4175 (Supp. 1987); D.C. CODE ANN. § 40-716 (Supp. 1994); FLA. STAT. ANN. § 316-193 (West Supp. 1994); GA. CODE ANN. § 40-6-391 (Supp. 1991); HAW. REV. STAT. § 291-4 (1991); IDAHO CODE § 18-8005 (Supp. 1992); ILL. ANN. STAT. Ch. 625, para. 5/11-501 (Smith-Hurd 1993); IND. CODE ANN. § 9-30-5-3 (West 1992); IOWA CODE ANN § 321 J.2 (West Supp. 1992); KAN. STAT. ANN. § 8-1567 (Supp. 1982); KY. REV. STAT. ANN. § 189A.010 (Baldwin Supp. 1991); LA. REV. STAT. ANN. § 14:98 (West Supp. 1993); ME. REV. STAT. ANN. tit. 29 § 1312-B (West Supp. 1994); MD. CODE ANN., [Transp.] § 27-101 (1987); MASS. GEN. LAWS ANN. Ch. 90, § 24 (West Supp. 1992); MICH. COMP. LAWS ANN. § 257.625 (West Supp. 1994); MINN. STAT. ANN. § 169.121 (West Supp. 1995); MISS. CODE ANN. § 63-11-30 (Supp. 1994); MO. ANN. STAT. § 577.023 (Vernon Supp. 1992); MONT. CODE ANN. § 61-8-714 (1991); NEB. REV. STAT. § 60-6.196(2) (Reissue 1993); NEV. REV. STAT. § 484.3792 (1991); N.H. REV. STAT. ANN. § 265:82-b (Supp. 1992); N.J. STAT. ANN. § 39:4-50 (West 1990); N.M. STAT. ANN. § 66-8-102 (Michie Cum. Supp. 1992); N.Y. [VEH. & TRAF.] LAW § 1193 (McKinney Supp. 1993); N.C. GEN. STAT. § 20-138.5 (Supp. 1994); N.D. CENT. CODE § 39-08-01 (Supp. 1991); OHIO REV. CODE ANN. § 4511.99 (Anderson 1990, Supp. 1994); OKLA. STAT. ANN. tit. 47, § 11-902 (West 1988, Supp. 1994); OR. REV. STAT. § 165.065 (Supp. 1990); 75 PA. CONS. STAT. ANN. § 3731 (1992); R.I. GEN. LAWS § 31-27-2.7 (Supp. 1994); S.C. CODE ANN. § 56-5-2940 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. § 32-23-3 (1989); TENN. CODE ANN. § 55-10-403 (Supp. 1992); TEX. REV. CIV. STAT. ANN. art. 6701l-1 (West 1991); UTAH CODE ANN. § 41-644 (Supp. 1994)(Amended 1994); VT. STAT. ANN. tit. 23, § 1210 (Supp. 1994); VA. CODE ANN. § 18.2-270 (Michie Supp. 1992); WASH. REV. CODE ANN. § 46.61.515 (West Supp. 1994); W. VA. CODE § 17c-5-2 (1991); WIS. STAT. ANN. § 346.65 (West 1991, Supp. 1994); WYO. STAT. § 31-5-233 (1989).

Nichols opens the door to a reexamination of the application of even an uncounseled felony conviction for purposes of sentencing. The questions raised by *Nichols* are not merely of academic interest, and its logical progression has particular currency in the context of criminal history provisions under state or federal sentencing guidelines.[13]

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL

A useful starting point for understanding the potential impact of *Nichols* is with an abbreviated consideration of the development and present parameters associated with the federal constitutional guarantee of trial counsel. Despite the explicit pronouncement found in the Sixth Amendment,[14] prior to 1938 it was not even federal court practice, except in capital cases, to require appointment of counsel for those who could not afford an attorney.[15] It was in *Johnson v. Zerbst*[16] that the United States Supreme Court first construed the Sixth Amendment to require such protection for the impoverished defendant accused of a felony in the federal system. The Court did not hold this specific right applicable to state prosecutions until its 1963 decision in *Gideon v. Wainwright*.[17]

Clarence Earl Gideon had been charged in a Florida state court with breaking and entering a poolroom with intent to commit a misdemeanor. This was a felony offense under Florida law. Appearing in court without funds, his request for a lawyer was denied.[18] State law provided for appointment of counsel only in capital cases and arguably he could not have availed himself of "special circumstances" that would have supported appointment under due process.[19] Overruling a 1942 precedent, *Betts v. Brady*,[20] which had rejected extending the Sixth Amendment right to counsel to the states, the Court held, absent a valid waiver, an indigent defendant in a state criminal proceed-

13. In addition to the federal scheme, presently 23 state jurisdictions have some form of sentencing guideline law and the list is growing with Massachuetts, Missouri, and Oklahoma currently looking at such laws. Moreover, 30 years after *Gideon*, the constitutional validity of uncounseled felony convictions is still being addressed by courts in one form or another. *See, e.g.*, *Ex parte* Jordan, 879 S.W.2d 61 (Tex. Crim. App. 1994).

14. The pertinent language of the amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

15. Bute v. Illinois, 333 U.S. 640, 660-61 (1948).

16. 304 U.S. 458 (1938).

17. 372 U.S. 335 (1963). Six years before *Zerbst*, the Court had recognized in Powell v. Alabama, 287 U.S. 45 (1932), a Fourteenth Amendment due process right to assistance of counsel. Thereafter, between 1932 and 1963, a "special circumstances" analysis was employed. *See supra* note 2.

18. Gideon v. Wainwright, 372 U.S. 335, 336-37 (1963).

19. *See supra* note 2.

20. 316 U.S. 455 (1942).

ing must be furnished trial counsel at the state's expense. In sharp contrast with its characterization of the fundamental fairness of a conviction obtained without counsel relied upon in *Betts*, the Court in *Gideon* found it to be "an obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided."[21] Therefore, an infraction of this constitutional guarantee would render a conviction void. Additionally, it is one of those "structural defects" in the trial process which defy analysis by "harmless error" standards.[22]

Given that Gideon was convicted of a felony, and coupled with language in the concurring opinion of Justice Harlan,[23] many lower courts viewed *Gideon* as having applicability only to felony cases.[24] The existence of such a limitation was eventually rejected by the Court with its 1972 decision in *Argersinger v. Hamlin*.[25]

The petitioner in *Argersinger* was an indigent who had been charged in Florida state proceedings with carrying a concealed weapon, an offense punishable by imprisonment for up to six months, a $1000 fine, or both. Upon conclusion of a bench trial at which Argersinger was not represented by counsel, a ninety day jail sentence was imposed.[26]

In defense of its denial of counsel under these circumstances, the state contended that an apt analogy could be found with the Court's cases dealing with the Sixth Amendment right to a jury trial. Those cases permitted crimes punishable by imprisonment for less than six months to be tried without a jury.[27] The Court rejected this approach, observing that "the assistance of counsel is often a requisite to the very existence of a fair trial," and "may well be necessary [for that purpose] even in a petty-offense prosecution."[28] Acknowledging that *Gideon v. Wainwright* involved a felony prosecution, the Court nevertheless found *Gideon's* rationale to be applicable and held that "absent

21. 372 U.S. 335, 344 (1963).
22. Arizona v. Fulminante, 499 U.S. 279, 309 (1991).
23. Gideon v. Wainwright, 372 U.S. 335, 349-52 (1963) (Harlan, J., concurring). Justice Harlan considered it appropriate to abandon a "special circumstances" test for serious offenses but wrote: "Whether the rule should extend to *all* criminal cases need not now be decided." *Id.* at 351.
24. *See* David S. Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions After Scott and Baldasar*, 34 U. FLA. L. REV. 517, 523-24 nn.25-27 (1982).
25. 407 U.S. 25 (1972).
26. *Id.* at 26.
27. *See, e.g.*, Baldwin v. New York, 399 U.S. 66, 68 (1970); Duncan v. Louisiana, 391 U.S. 145, 160-61 (1968). *But see* Blanton v. City of North Las Vegas, 489 U.S. 538, 548 (1989) (holding that an offense carrying a maximum prison term of six months or less is presumed to be "petty" and defendant is entitled to jury trial only if he can demonstrate additional statutory penalties reflecting legislative determination that the offense in question is a "serious" one).
28. Argersinger v. Hamlin, 407 U.S. 25, 31, 33 (1972).

a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[29]

However, *Argersinger* specifically reserved considering the requirements of the Sixth Amendment regarding the right to counsel where loss of liberty did not occur.[30] This in turn created almost as much uncertainty and conflicting opinion as was meant to be resolved by the decision itself. Some state and lower federal courts read the opinion to mandate appointment whenever imprisonment was an authorized penalty. Others held convictions constitutionally valid as long as no actual imprisonment resulted.[31] Resolution as to what was dictated by the Sixth and Fourteenth Amendments came seven years subsequent to *Argersinger* with *Scott v. Illinois*.[32]

In *Scott*, the indigent and uncounseled defendant had been convicted of shoplifting in an Illinois state court. The applicable state statute set the maximum sanction for such an offense at one year in jail, a $500 fine, or both. The penalty imposed at the conclusion of Scott's bench trial had been a fine of fifty dollars.[33] The position taken by the Illinois Supreme Court was an actual imprisonment standard.[34] Under this test, Scott's conviction was constitutionally proper because only a fine had been extracted. On appeal to the United States Supreme Court, Scott contended that the Court's Sixth Amendment decisions, most notably *Argersinger*, required a state to provide counsel whenever imprisonment is an authorized penalty. Interpreting the thrust, if not the actual holding, of *Argersinger* as providing deprivation of personal liberty as the line defining the constitutional right to appointment, a majority of the Court rejected this contention.[35] Thus, a misdemeanor conviction retains its constitutional validity in the face of a right to counsel argument so long as the defendant is not actually sentenced to jail.[36] But, if not void in the first instance, can it nevertheless carry the effect of being a nullity for derivative purposes such as increasing the potential or actual punishment under a recidivist statute?

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29. *Id.* at 37.

30. *Id.*

31. Rudstein, *supra* note 24, at 526 nn.41-42.

32. 440 U.S. 367 (1979).

33. *Id.* at 368.

34. People v. Scott, 369 N.E.2d 881, 882 (1977).

35. Scott v. Illinois, 440 U.S. 367, 372-73 (1979). Then associate Justice Rehnquist authored the majority opinion which was joined by Chief Justice Burger, Justice Stewart, Justice White, and Justice Powell.

36. *See, e.g.*, United States v. Nichols, 979 F.2d 402, 414-18 (6th Cir. 1992)(Nelson, J., concurring); United States v. Castro-Vega, 945 F.2d 496, 499 (2nd Cir. 1991).

III. USE OF PRIOR CONVICTIONS FOR PENALTY ENHANCEMENT

Four years after *Gideon* was decided, the Court held in *Burgett v. Texas*[37] that the prosecution could not offer into evidence a prior felony conviction that was invalid under the dictates of *Gideon* in an effort to increase or enhance the defendant's punishment under a repeat offender's statute. The essence of the lesson from *Burgett* and its companion cases[38] is to prevent erosion of the right to counsel safeguard. In other words, that which is invalid initially retains such status and precludes its collateral use for purpose of sentence enhancement.

Presumptively such a conviction would be void on its face whether or not imprisonment results. Two weeks before *Nichols* was handed down, the Court, in *Custis v. United States*,[39] characterized the failure to appoint counsel as a "unique constitutional defect"[40] which was "jurisdictional."[41] Still, the Court has never held that an uncounseled conviction, even a felony conviction, is invalid for all purposes. This point was explicitly made in *Lewis v. United States*.[42]

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37. 389 U.S. 109 (1967).

38. United States v. Tucker, 404 U.S. 443, 448-49 (1972) (consideration of prior uncounseled conviction improper on question of sentence); Loper v. Beto, 405 U.S. 473, 489 (1972) (prior conviction without counsel or waiver not admissible to impeach).

39. 114 S. Ct. 1732 (1994). At issue in *Custis* was whether or not a defendant in a federal sentencing proceeding had the right to collaterally attack the validity of previous state convictions being used to enhance his sentence. *Id.* at 1734. In this case, the government was attempting to trigger enhancement provisions under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1988) [hereinafter ACCA] by claiming Custis had three prior felony convictions. At the sentencing hearing, two of three convictions were challenged. The basis of one challenge was that the defendant's attorney had rendered unconstitutionally ineffective assistance of counsel resulting in a guilty plea that was not knowing and intelligent as required by Boykin v. Alabama, 395 U.S. 238 (1969). Custis v. United States, 114 S. Ct. 1732, 1734 (1994).

The second ground for relief was a claim that a second conviction had been based on a "stipulated fact" trial that was the equivalent of a guilty plea and that this conviction was fundamentally unfair because Custis had not been adequately advised of his rights. An additional claim of ineffective assistance of counsel was bootstrapped to this second allegation. *Id.*

The majority opinion, also authored by Chief Justice Rehnquist, rejected these arguments without reaching their merits. Any statutorily based relief was foreclosed, in part, because the language of the ACCA focused on the mere fact of the conviction. The constitutional questions were not an option because the claims being raised were not of "jurisdictional significance." *Id.* at 1737. The opinion suggested that only a conviction obtained in violation of the right to counsel was subject to the type of collateral attack that the defendant wished to mount. *Id.* at 1739.

40. Custis v. United States, 114 S. Ct. 1734, 1738 (1969).

41. *Id.*

42. 445 U.S. 55, 66-67 (1980).

In 1961,[43] the petitioner in *Lewis*, without benefit of counsel, pled guilty to a felony in a Florida state court and served a term of imprisonment.[44] Sixteen years later, Lewis was arrested and charged with knowingly receiving and possessing a firearm in violation of 18 U.S.C. § 1202(a)(1). This particular provision made it a crime for one convicted of a felony to possess a firearm. Prior to his trial on this offense, his attorney informed the court that Lewis had not been represented by counsel at the 1961 conviction proceeding in violation of *Gideon*. Counsel argued that the initial felony conviction could not then be used to serve as the predicate for a violation of the possession statute. The trial court rejected this contention, holding the prior conviction constitutionally immaterial to Lewis' status under the law as a previously convicted felon.[45]

On grant of certiorari, the United States Supreme Court upheld the use of even a conviction obtained in violation of a defendant's Sixth Amendment right to counsel for the purpose of placing him in the category of being "presumptively dangerous."[46] In order to reach the constitutional issues, the Court first had to focus on the statute itself. The Court concluded that nothing on the face of the statute or in its legislative history suggested a congressional intent to limit the classification of "convicted" to individuals whose convictions are not subject to collateral attack.[47]

In respect to due process concerns, the Court had little trouble in holding that Congress could rationally find "that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm."[48] The more difficult hurdle to overcome was grounded in the Sixth Amendment conventions established by *Burgett*, *Tucker v. United States*,[49] and *Loper v. Beto*.[50] These three cases were distinguished by noting that the federal gun

43. Kitchens v. Smith, 401 U.S. 847, 847 (1971), held *Gideon* to be fully retroactive.
44. Lewis v. United States, 445 U.S. 55, 56-57 (1980).
45. *Id.* at 58.
46. *Id.* at 64.
47. *Id.* at 60. The opinion noted: "The statutory language is sweeping, and its plain meaning is that the *fact* of a felony conviction imposes a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action, such as a qualifying pardon." *Id.* at 60-61 (emphasis added).
48. *Id.* at 66.
49. 404 U.S. 443 (1972). Here the Court affirmed a remand by a court of appeals ordering reconsideration of a sentence that was imposed. *Id.* at 449. The sentencing judge had considered two previous convictions that were invalid under *Gideon*. *Id.* at 444-45.

One suggestion put forth by the government to try and save the sentence was that the "relevant inquiry is not whether the defendant has been formally convicted of past crimes, but whether and to what extent the defendant has in fact engaged in criminal or antisocial conduct." *Id.* at 446. This argument was not directly rejected; instead it was put aside because the sentencing authority was not dealing with "a sentence imposed in the informed discretion of a trial judge,

laws focused not upon the reliability of the past uncounseled conviction, "but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons."[51]

In the context of a misdemeanor, it seems clear that the initial conviction is constitutionally void only if a jail sentence has been levied. Therefore, a misdemeanor conviction may in fact be "initially valid" despite the absence of counsel. Neither *Scott* nor *Argersinger* addressed the question of whether a valid uncounseled misdemeanor conviction not resulting in imprisonment could be used for collateral purposes. This was the issue that brought *Baldasar v. Illinois*[52] to the Court.

The facts of *Baldasar* are relatively simple. Thomas Baldasar was convicted of misdemeanor theft in May 1975. Under Illinois law at the time, the maximum penalty available upon a first conviction of this offense was "not more than a year of imprisonment and a fine of not more than $1,000."[53] No one disputes that during the court proceeding Baldasar was not represented by an attorney nor had he formally waived his Sixth Amendment right to trial counsel. However, the sentence imposed was a fine of $159 and one year's probation[54] which under *Scott* and *Argersinger* would provide the immunity from any such constitutionally-based attack[55] and, hence, a valid conviction for right to counsel purposes.

The state statutory scheme further authorized upon a second conviction for the same offense that the subsequent crime could be treated as a felony with the potential punishment range being increased to a prison term of one to three years.[56] Six months after his initial conviction, Baldasar was again charged and found guilty of theft of property not exceeding $150 in value.[57] This time he was charged with a second offense. Represented by a lawyer at this trial, defense counsel

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but with a sentence founded at least in part upon misinformation of constitutional magnitude." *Id.* at 447.

After *Lewis* and now *Nichols*, one may question whether a sentencing judge's discretion would be similarly "uninformed." Particularly, if the issue is not the conviction itself but its use as an historical reference to a defendant's past criminal behavior and its weight in that context.

50. 405 U.S. 473 (1972). Here the Court disallowed the use of a *Gideon*-flawed conviction to impeach the general credibility of the defendant. *Id.* at 483.
51. Lewis v. United States, 445 U.S. 55, 67 (1980).
52. 446 U.S. 222 (1980).
53. *Id.* at 223.
54. *Id.*
55. The state appellate opinion, People v. Baldasar, 367 N.E.2d 459 (1977), was handed down two years before the *Scott* decision, but interpreted *Argersinger* as calling for actual imprisonment as the requisite for appointment of counsel. *Id.* at 463.
56. Baldasar v. Illinois, 446 U.S. 222, 223 (1980).
57. *Id.*

objected when the prosecution introduced the first misdemeanor conviction as evidence of the defendant's recidivist conduct.[58] While conceding the earlier 1975 theft conviction to be valid, the essence of the defense's challenge was that the accused was now being imprisoned as a direct or collateral result of the prior uncounseled conviction. Hence, Baldasar asserted that the line drawn in *Argersinger*, with its focus upon reliability being the linchpin for finding loss of one's liberty to be constitutionally impermissible, had been crossed. This argument was rejected by the trial court, and, as a consequence, Baldasar was sentenced to a term of one to three years in the state penitentiary.[59] Relying upon its reading of Supreme Court precedent, the Illinois Appellate Court also turned aside the creation of a collateral use restriction for an *Argersinger*-allowable conviction.[60]

In an opinion denoted as a plurality in some quarters,[61] and by other courts labeled as a decision "divided in such a way that no rule can be said to have resulted,"[62] the United States Supreme Court reversed the conviction. This end was reached through a 5-4 per curiam effort that rested upon reasons expressed in three separate concurring opinions that failed to agree upon a rationale.

Reduced to its most logical and intellectually defensible common denominators, the decision represents three separate positions. Only two of these actually addressed the issue then before the Court. Ironically, the approach taken by the four dissenting justices who would have affirmed the Illinois court's action garnered the most support. Justice Powell, writing for himself and three other members of the Court,[63] expressed a view that would have upheld the state's position. Noting the distinction that had been drawn in respect to the initial constitutional validity of the uncounseled felony and misdemeanor convictions, these members felt a conviction considered proper under the Sixth Amendment in the first instance retained that status for all purposes and, therefore, could be used as a basis for enhancement.[64] An opposite conclusion was reached in two concurring appraisals by four other members of the Court. These concurring opinions used an analysis described as a "but for" test[65] in a 1984 New Hampshire Supreme Court opinion authored by Justice Souter, then serving as a state appellate judge. In a brief concurrence, Justice Stewart found

58. *Id.*
59. *Id.*
60. People v. Baldasar, 367 N.E.2d 459, 462 (Ill. App. Ct. 1979).
61. *See, e.g.*, Schindler v. Clerk of Circuit Court, 715 F.2d 341, 345 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984).
62. United States v. Robles-Sandoval, 637 F.2d 692, 693 n.1 (9th Cir. 1981).
63. Justice Powell's position was joined by Chief Justice Burger, Justice White and Justice Rehnquist. Baldasar v. Illinois, 446 U.S. 222, 230 (1980).
64. *Id.* at 231 (Powell, J., dissenting).
65. State v. Cook, 481 A.2d 823, 828 (N.H. 1984).

the sanction imposed upon Baldasar improper because the defendant had been "sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense."[66] This separate opinion was joined by Justice Brennan and Justice Stevens. These two justices also joined the concurring opinion written by Justice Marshall who agreed that the penalty received would not have been authorized by statute "but for" and as a direct consequence of the earlier uncounseled conviction.[67] But these three justices additionally rejected the validity of Baldasar's initial misdemeanor itself with an insistence that basing the guarantee of counsel upon the actual imprisonment standard of *Scott* was wrong.[68] The failure of Justice Stewart to endorse this latter attack upon the validity of the first conviction as opposed to the validity of its use is understandable. Only a year earlier he had been in the *Scott* majority which had drawn the disputed line.[69]

The fifth vote necessary for the resulting reversal was cast by Justice Blackmun. However, not wavering from the view he had expressed in his dissent in *Scott*,[70] Justice Blackmun did not focus upon the degree of permissible *application* with respect to the original misdemeanor but rather on an assessment of its initial standing. He again proposed the adoption of a "bright line" rule that would afford counsel whenever the prosecution involved either a potential punishment in excess of six months or when a period of incarceration was actually imposed.[71] Applying this standard to Baldasar, the Justice found that while not jailed as a result of the prior misdemeanor trial, it had been for a crime with potential punishment of more than six month's imprisonment. Therefore, given the absence of counsel that his reading of the Sixth Amendment mandated, the first conviction was completely invalid at the outset and foreclosed its use as a predicate offense for enhancement purposes.[72] In effect, he declined to apply *Scott*.

In reaching its reversal of Baldasar's conviction, then, four justices agreed that an uncounseled misdemeanor conviction, initially valid under *Scott* because no jail time was imposed, could be used for pur-

66. Baldasar v. Illinois, 446 U.S. 222, 224 (1980)(Stewart, J., concurring)(emphasis added).
67. *Id.* at 226-27 (Marshall, J., concurring).
68. *Id.* at 225 (Marshall, J., concurring).
69. Scott v. Illinois, 440 U.S. 367 (1979).
70. *Id.* at 389-90 (Blackmun, J., dissenting).
71. Baldasar v. Illinois, 446 U.S. 222, 229-30 (1980)(Blackmun, J., concurring). Arguably, under this approach a "petty" offense that did not result in loss of liberty could be considered valid for purposes of enhancement. *See* State v. Orr, 375 N.W.2d 171, 176 (N.D. 1985).
72. Baldasar v. Illinois, 446 U.S. 222, 230 (1980)(Blackmun, J., concurring).

poses of sentence enhancement.[73] Four other justices specifically disagreed on this point.[74] However, of this latter group, three considered the initial conviction constitutionally invalid[75] while the fourth adhered to its validity under *Scott*.[76] The justice casting the deciding vote chose not to express a view on whether an uncounseled conviction, if valid under *Scott*, could subsequently be used for enhancement.[77]

IV. APPLICATION OF *BALDASAR* AND THE NEED FOR *NICHOLS*

Unlike justices of the United States Supreme Court, lower court jurists found themselves more constrained than Justice Blackmun and were not able to "pick and choose among Supreme Court precedents."[78] In those courts' efforts to discern the proper scope of the *Baldasar* decision, a spectacle of inconsistency developed. What was most disconcerting about the range of the subsequent case analysis was that at the extremes of the spectrum the conclusions were in direct contradiction[79] but with full intellectual honesty supported by the *Baldasar* opinion. While the diversity of the interpretations do not lend themselves readily to unconditional categorization, these lower court opinions can be classified into four distinct groupings.

One of the four approaches was that of avoidance. A number of courts made an effort to reconcile the varying rationales found in *Baldasar*, but decided the analogous issue then before them ultimately, or in the alternative, based upon an interpretation of their state constitution.[80]

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73. *Id.* at 230-35 (Powell, J., dissenting, joined by Burger, C.J., White & Rehnquist, JJ.).
74. *Id.* at 224 (Stewart, J., concurring, joined by Brennan & Stevens, JJ.), & 224-29 (Marshall, J., concurring, joined by Brennan & Stevens, JJ.).
75. *Id.* at 225 (Marshall, J., concurring).
76. *Id.* at 224 (Stewart, J., concurring).
77. *Id.* at 229-30 (Blackmun, J., concurring). This is also the assessment of Justice Brennan's position made by Justice Souter in Nichols v. United States, 114 S. Ct. 1921, 1929 (1994) (Souter, J., concurring).
78. This critical assessment was voiced in United States v. Nichols, 979 F.2d 402, 415 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994).
79. *Compare, e.g.*, State v. Chance, 405 S.E.2d 375 (S.C. 1991) (prior uncounseled conviction constitutionally valid for all purposes, including sentence enhancement, if defendant was not actually incarcerated on prior conviction) *and* State v. Seavey, 472 A.2d 1379 (Me. 1984) (prior uncounseled conviction allowed because the focus is not on reliability or nonreliability of the previous uncounseled conviction, but on the mere fact of conviction) *with, e.g.*, Sargent v. Commonwealth, 360 S.E.2d 895 (Va. Ct. App. 1987) (prior uncounseled conviction valid for enhancement purposed, even if defendant was not incarcerated on the prior conviction).
80. Pananen v. State, 711 P.2d 528 (Alaska Ct. App. 1985); State v. Orr, 375 N.W.2d 171 (N.D. 1985); State v. Armstrong, 332 S.E.2d 837 (W. Va. 1985). *See also* People v. Stratton, 384 N.W.2d 83, 87 (Mich. Ct. App. 1985)(observing that given the

The more traditional avenue, one which can be characterized as a majority holding, was to find that a defendant's prior uncounseled misdemeanor convictions, even those valid under *Scott*, could not be used to enhance a sentence in any way.[81] The justification used to support this application was primarily a combination of the end result reached in *Baldasar* and a "but for" appraisal of the effect the uncounseled predicate conviction had upon any subsequent penalty.

A third line of cases found support in Justice Blackmun's concurring opinion in *Baldasar*. These holdings upheld the use of uncounseled first convictions for recidivist purposes, including punishment, as long as these convictions had not resulted in incarceration or had a potential sentencing range exceeding six months.[82] This was the "bright line" that Justice Blackmun had found to separate the valid from the invalid misdemeanor conviction.[83] The lower courts which adopted this position then extrapolated that Justice Blackmun would join the four *Baldasar* dissenters in finding that, if valid in the first instance, it would retain that potency for enhancement purposes.[84] One variation on the "middle-ground" approach was to find *Baldasar* restrictions not applicable if the effect of the prior uncounseled conviction did not increase the possible maximum penalty or convert a misdemeanor offense into a felony.[85]

The final grouping was comprised of those opinions that essentially found that an uncounseled conviction was valid for all purposes, including enhancement.[86] Significantly, this category was further subdivided into those cases that spoke of the prior uncounseled conviction being valid under *Scott*,[87] and those relying upon the status-created rationale of *Lewis*.[88] Under the latter of these two sub-categories, the focus was not on "reliability or non-reliability of the previous uncounseled conviction, but on the mere fact of conviction."[89] At the time

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state of federal law, states may feel free "to choose the view [of *Baldasar*] which seems most appropriate").

81. *E.g.*, State v. Laurick, 574 A.2d 1340 (N.J. 1990); People v. Stratton, 384 N.W.2d 83 (Mich. Ct. App. 1985); State v. Ulibarri, 632 P.2d 746 (N.M. Ct. App. 1981).
82. Hlad v. State, 585 So. 2d 928 (Fla. 1991); Commonwealth v. Thomas, 507 A.2d 57 (Pa. 1986).
83. Baldasar v. Illinois, 446 U.S. 222, 229-30 (1980) (Blackmun, J., concurring).
84. Hlad v. State, 585 So. 2d 928, 932 (Fla. 1991); Commonwealth v. Thomas, 507 A.2d 57, 61 (Pa. 1986).
85. *E.g.*, United States v. Eckford, 910 F.2d 216, 220 (5th Cir. 1990); Moore v. State, 352 S.E.2d 821 (Ga. Ct. App. 1987).
86. *E.g.*, State v. Chance, 405 S.E.2d 375, 376 (S.C. 1991); Sheffield v. City of Pass Christian, 556 So. 2d 1052, 1053 (Miss. 1990); State v. Seavey, 472 A.2d 1379 (Me. 1984).
87. *E.g.*, State v. Chance, 405 S.E.2d 375 (S.C. 1991).
88. *E.g.*, State v. O'Neill, 473 A.2d 415 (Me. 1984). *See supra* notes 42-51 and accompanying text.
89. State v. O'Neill, 473 A.2d 415, 419 (Me. 1984).

Nichols was decided, either singularly or in tandem, this approach occupied a minority position as related to state recidivist statutes.

However, in the context of the 1987 federal sentencing guidelines[90] and its criminal history provisions,[91] a very narrow reading of *Baldasar* was the conventional thinking. Although a split in the circuits was present,[92] a majority of the appellate courts that considered the issue found no statutory or constitutional prohibition to counting prior uncounseled convictions valid under *Scott* in calculating a defendant's criminal history category for sentencing purposes.[93] It was in this historical environment that certiorari was ordered in *Nichols*.

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90. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017-34 (codified as amended at 28 U.S.C. §§ 991-998 (1988)) established the United States Sentencing Commission. This seven-member commission was charged with the responsibility to develop sentencing ranges to be used in the federal system.

Justice Stephen Breyer was a member of the original commission and has written that this congressional initiative had two goals. The first of these was to bring "honesty" to federal criminal sentences. At the time, the Federal Parole Commission in large measure controlled the point at which a prisoner could be released despite the term of imprisonment handed down at trial. Accomplishment of this goal was undertaken through the abolishment of parole for federal prisoners. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (Fall 1988).

The second goal was to reduce a wide disparity in sentencing then occurring amongst federal judges for essentially identical and otherwise indistinguishable crimes. In its effort to remedy this shortcoming, Congress empowered the commission to develop standardized sentencing ranges which were to reflect the then existing norm being imposed for similar crimes. The result was promulgation of the *Federal Sentencing Guidelines Manual*. Since November 1987, these Federal Sentencing Guidelines have been the law. *Id.*

91. The *Federal Sentencing Guidelines Manual* provides a sentencing table that takes the form of a grid. To find the respective sentencing range on that grid one needs to arrive at both an "offense level" and a "criminal history category."

Along the left hand margin of the grid (the vertical axis) is the defendant's offense level. A defendant's position on this numerical scale is arrived at by totaling points assigned in the manual to specific characteristics of the offense itself. Across the top of the grid (the horizonal axis) is reflected six criminal history categories. A defendant's category is determined by assessing criminal history points, which the manual provides, based upon prior criminal activities of the individual defendant.

The sentencing range in months is determined by identifying the intersection of the offense level and criminal history category. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (Nov. 1993) (sentencing tbl.).

92. *Compare* United States v. Eckford, 910 F.2d 216, 220 (5th Cir. 1990) (*Baldasar* does not preclude the use of uncounseled misdemeanor convictions during sentencing for a subsequent criminal offense) *with* United States v. Brady, 928 F.2d 844, 854 (9th Cir. 1991).

93. Opinions in three circuit courts of appeals would allow consideration of prior uncounseled misdemeanor convictions for sentencing purposes. These were the Sixth, Second and Fifth Circuits. *See* United States v. Nichols, 979 F.2d 402, 415-18 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994); United States v. Castro-Vega,

V. THE DECISION IN *UNITED STATES v. NICHOLS*

The petitioner, Kenneth O. Nichols, had pleaded guilty to federal felony drug charges in 1990. At his sentencing, in accordance with federal sentencing guidelines, he was assessed a number of criminal history points for previous convictions.[94] One of these points was assessed for a 1983 state misdemeanor conviction for driving under the influence (DUI) for which he was fined $250 but was not incarcerated.[95] The potential sentence for this misdemeanor was one year imprisonment and a fine of $1000.[96] This additional point increased the maximum sentence available under the guidelines.[97]

Nichols objected to the use of the DUI misdemeanor conviction to arrive at his criminal history score because he was not represented by counsel at that proceeding. It was his contention that to do so "would violate the Sixth Amendment as construed in *Baldasar*."[98] While accepting that the misdemeanor was uncounseled and there had been no waiver as to the right to counsel, the district court rejected this argument. Using the prior uncounseled conviction to arrive at a criminal history score, the court sentenced Nichols to the maximum term allowed by the sentencing guidelines. This was a term of imprisonment twenty-five months longer than would have been possible without the prior uncounseled conviction.[99] A divided panel of the Court of Appeals for the Sixth Circuit affirmed.[100]

The essence of finding *Baldasar* not applicable, both in the district court and court of appeals, was a determination that limited the precedent to its particular facts. Both courts found that preclusion of a prior uncounseled misdemeanor conviction, not carrying an initial jail sentence, was proper only when the effect of its consideration would be to convert a misdemeanor into a felony—essentially the same result in *Baldasar*.[101] Because these were not the circumstances in Nichols' case, the courts concluded that the sentence was being correctly calculated. Moreover, each of the two lower courts noted that the sentenc-

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945 F.2d 496, 500 (2nd Cir. 1991); United States v. Eckford, 910 F.2d 216, 220 (5th Cir. 1990). When the Ninth Circuit considered the issue, it found that *Baldasar* and the Sixth Amendment would not allow such use of an uncounseled misdemeanor conviction. United States v. Brady, 928 F.2d 844, 854 (9th Cir. 1991).

94. Nichols v. United States, 114 S. Ct. 1921, 1924 (1994). *See supra* notes 90-91.

95. Nichols v. United States, 114 S. Ct. 1921, 1924 (1994).

96. *Id.* at 1924 n.1.

97. *Id.* at 1925.

98. *Id.* at 1924.

99. *Id.* at 1925.

100. United States v. Nichols, 979 F.2d 402 (6th Cir. 1992), *aff'd*, 114 S. Ct. 921 (1994).

101. *Id.* at 417; United States v. Nichols, 763 F. Supp. 277, 279 (D. Tenn. 1991) *aff'd*, 979 F.2d 402 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994).

ing guidelines explicitly allowed for the inclusion of such prior convictions.[102]

Upon finding its way to the United States Supreme Court, a majority there also rejected Nichols' Sixth Amendment argument and affirmed the use of his DUI conviction for sentencing purposes. Taking a position that aligned themselves with the dissenters in *Baldasar*, five members[103] of the Court found nothing in the sentencing procedure to violate constitutional standards. In the majority's view, a previous conviction, valid under *Scott*, was sufficiently reliable enough on its face to enhance a defendant's sentence upon conviction for a subsequent offense.

A sixth justice[104] concurred in the judgment, opting to read the sentencing guidelines in respect to the use of a prior valid uncounseled conviction as being "presumptive" in nature. Construed in this manner, there would be an avenue open to an accused to go beyond the face of a previous conviction and demonstrate its unreliability for purposes of establishing "past criminal conduct or predicting the likelihood of recidivism,"[105] thereby making it "'constitutionally permissible' for a federal court to 'consider a prior uncounseled misdemeanor conviction' in sentencing a defendant under the sentencing guidelines."[106] In adopting this construction, the "difficult constitutional question . . . need not be answered in deciding this case."[107]

The three remaining members of the Court[108] strenuously objected to what they considered inherently unreliable convictions being used in any way to increase punishment. Citing *Burgett* and *Tucker*, these justices questioned why those rules applicable to uncounseled felony convictions and premised on the notion that an uncounseled conviction is too unreliable to support a prison sentence should not apply equally to uncounseled misdemeanor convictions. They could see no distinction between the two circumstances.[109] In making this point, the dissent noted that the case had already been made (and accepted) that reliability concerns are just as real, if not more so, in an atmos-

102. United States v. Nichols, 979 F.2d 402, 417 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994); United States v. Nichols, 763 F. Supp. 277, 278-79 (D. Tenn. 1991) *aff'd*, 979 F.2d 402 (6th Cir. 1992), *aff'd*, 114 S. Ct. 1921 (1994).

103. Chief Justice Rehnquist delivered this opinion for the Court and was joined by Justice O'Connor, Justice Scalia, Justice Kennedy and Justice Thomas.

104. Justice Souter filed an opinion concurring in the judgment.

105. Nichols v. United States, 114 S. Ct. 1921, 1930 (1994)(Souter, J., concurring).

106. *Id.* at 1931 (citing language from the majority opinion).

107. *Id.* at 1929. Arguably, nothing in the majority's holding would prevent them from eventually embracing such reasoning.

108. Justice Blackmun authored a dissent that was joined by Justice Stevens and Justice Ginsburg. Justice Ginsburg filed a brief dissent in which she distinguished her position in Custis v. United States, 114 S. Ct. 1732 (1994).

109. Nichols v. United States, 114 S. Ct. 1921, 1935-36 (1994) (Blackmun, J., dissenting).

phere of potential "assembly-line justice" that accompanies misdemeanor prosecutions.[110]

The majority opinion did not directly address reliability concerns but rather ground its logic on three premises. First, the majority made an implicit assessment, not disputed by the dissent, that the DUI conviction was valid under *Scott*.[111] Second, a recognition, also not questioned by the dissent, was made that enhancement statutes "whether in the nature of criminal history provisions such as those contained in the sentencing guidelines, or recidivist statutes which are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction."[112] Third, and most significantly, reliance on this conviction would be "consistent with the traditional understanding of the sentencing process."[113] The Court viewed the sentencing component as "less exacting" than the process employed to establish guilt. The opinion noted past criminal behavior was a relevant sentencing factor independent of any criminal conviction for that conduct. Moreover, the evidence needed to support consideration of the conduct need only satisfy a preponderance standard of proof.[114] Hence, consistent with due process, the majority explained that the

> petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct which gave rise to the previous DUI offense. . . . Surely, then, it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proven beyond a reasonable doubt.[115]

The Court also turned aside Nichols' contention that due process should require a misdemeanor defendant to be warned that his conviction might be used for enhancement purposes should the defendant later be convicted of another crime. The basis of this rejection was two-fold: the absence of any such requirement to be found in *Scott* and the impracticality of its implementation.[116]

VI. THE LOGIC OF *NICHOLS* OPENS MORE THAN ONE DOOR

The immediate holding of *Nichols* is important in its own right. It resolves an issue that has badly splintered state and federal courts

110. *Id.* (citing Argersinger v. Hamlin, 407 U.S. 25, 36 (1972) and Baldasar v. Illinois, 446 U.S. 222, 228 n.2 (1980)(Marshall, J., concurring)).
111. *Id.* at 1927.
112. *Id.* The dissent argued that this focus missed the mark for two reasons. First, while there was no violation of double jeopardy it was "undeniable that Nichols' DUI conviction directly resulted in more than two years' imprisonment." Second, and more importantly, the present concern was not one of multiple punishment but of reliability. *Id.* at 1933. (Blackmun, J., dissenting, joined by Stevens & Ginsburg, JJ.).
113. *Id.* at 1927.
114. *Id.* at 1928.
115. *Id.*
116. *Id.*

ever since *Baldasar* was decided in 1980. The Court has issued a clear mandate "that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."[117] There should also be no question that this rule applies in the context of both recidivist statutes and criminal history provisions found in sentencing guidelines.

However, in reaching this conclusion, the Court shifted its focus from an inquiry of reliability to an assessment of historical references reflecting "past criminal behavior." If, in fact, logic dictates that it is "constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proven beyond a reasonable doubt" then does it not extend to even the uncounseled felony conviction? If the relevant concern is "past criminal behavior," this would be the case even if the initial conviction was *invalid* in the first instance for lack of counsel. Any such distinction between predicates that are valid or invalid for enhancement purposes loses its definition if the focus is not upon the *conviction* but the *conduct* it represents, particularly if the threshold for establishing the behavior in question is a preponderance of the evidence. Even if reliability in some way informs the enhancement protocol, the logical progression does not change. If a prior uncounseled misdemeanor conviction is sufficiently reliable to justify imposition of an additional twenty-five month term of imprisonment because the individual is not being penalized under the first offense, then inquiry as to counsel at the initial or predicate conviction also seems to lack relevance.

Additionally, it should be recalled that *Lewis*[118] allowed an uncounseled and, therefore, under *Gideon*, unlawful felony conviction to serve as the basis for subjecting an individual to direct[119] criminal liability for possession of a firearm. The Court in *Lewis* perceived that the federal gun law in question did not focus on reliability but on the mere fact of conviction. The status of being "presumptively dangerous" was found by the Court to be a rational legislative judgment even if an allegedly uncounseled conviction was being used to achieve it.[120]

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117. *Id.*

118. *See supra* notes 45-51 and accompanying text.

119. The status of felon was an element of the crime that had to be proven beyond a reasonable doubt.

120. Lewis v. United States, 445 U.S. 55, 63-64, 67 (1980). The Court reasoned that when one took into account Congress' legitimate concern for the easy availability of firearms and the connection between firearms and violent crime:

> Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational. Enforcement of that essentially civil disability

Moreover, although the court was aware of *Lewis* at the point it decided *Baldasar*,[121] it did not in that opinion narrow or displace the *Lewis* rationale.[122] It remains "good authority" even today.[123]

In his concurring opinion in *Nichols*, Justice Souter pointed out that under the federal sentencing guidelines

> the role prior convictions play in sentencing is *presumptive*, not conclusive, and a defendant has the chance to convince the sentencing court of the unreliability of any prior valid but uncounseled convictions in reflecting the seriousness of his past criminal conduct or predicting the likelihood of recidivism.[124]

If focus on a conviction is as a historical reference, Justice Souter's comment could be amended to include even the "invalid" conviction. In any case, if any analogy is to be drawn to the role of an uncounseled conviction in sentencing, at least in the context of federal guidelines, it more closely resembles *Lewis* than *Burgett* or *Tucker*.[125]

If drawn, this analogy opens the door to muting questions as to whether a conviction is valid or invalid in the first instance. The emphasis would not be upon the conviction but the fact of that conviction and what it represents for purposes of one's criminal history status. Certainly, sentencing guidelines, whether state or federal, could be written or interpreted so such activity would merit its inclusion within a "presumptively dangerous" category.[126] Much like a shot across a ship's bow, the previous entanglement could be viewed as putting an

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> through a criminal sanction does not "support guilt or enhance punishment . . . on the basis of a conviction that is unreliable when one considers Congress' broad purpose."

Id. at 67 (footnote omitted).

121. Even though *Baldasar* was argued in November 1979 and *Lewis* in January 1980, *Lewis* was decided two months before *Baldasar*. *Lewis* was decided on February 27, 1980. Lewis v. United States, 445 U.S. 55 (1980). *Baldasar* was decided on April 22, 1980. Baldasar v. Illinois, 446 U.S. 222 (1980).

122. The only mention of *Lewis* in *Baldasar* is a reference found in a footnote to the dissenting opinion. There, the dissenters noted the *Baldasar* "decision is all the more puzzling in view" of the decision in *Lewis*. Baldasar v. Illinois, 446 U.S. 222, 234 n.3 (1980)(Powell, J., dissenting, joined by Burger, C.J., White & Rehnquist, JJ.).

123. *See* Custis v. United States, 114 S. Ct. 1732, 1736-37 (1994)(use of *Lewis* to support statutory interpretation that prior convictions used for sentence enhancement not subject to collateral attack in sentencing proceedings). *See also supra* note 39.

124. Nichols v. United States, 114 S. Ct. 1921, 1930 (Souter, J., concurring)(emphasis added).

125. The extension of the *Nichols* majority reasoning becomes more difficult to achieve with recidivist statutes because those are normally channeled to considerations of "prior convictions," a more conclusive approach. Still, if "conviction" is construed to be a surrogate for conduct, it is not an insurmountable hurdle.

126. Additionally, *Burgett* and *Tucker* cannot be distinguished on the basis of "jurisdictional error." The felony conviction at issue and found to be properly used in *Lewis* was also based upon a "unique constitutional defect" which would be "jurisdictional." *See supra* notes 39-47 and accompanying text.

individual on notice of the risk involved with any subsequent criminal activity.

VII. CONCLUSION

The confusing and contradictory applications of *Baldasar* in the lower courts dictated its reassessment. Now the Supreme Court has held that "consistent with the Sixth and Fourteenth Amendments . . . an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."[127] However, to reach this conclusion the Court did not simply rely upon the constitutional validity of the first conviction or the fact that enhancement statutes "do not alter or enlarge" the prior sentence.[128] Rather, the Court shifted the inquiry from one of reliability to a broader question as to the function served by sentencing provisions. Convictions then may be viewed essentially as historical references reflecting past criminal conduct.

At a minimum, the concern for reliability that has provided a bulwark against the use of prior uncounseled convictions has been diluted by the logic employed to reach the result in *Nichols*. Toward the other end of the spectrum, it provides the entree for reexamination of the prohibition against the use of even uncounseled felony or invalid misdemeanor convictions for purposes of sentencing. The latter would be particularly true in the context of state or federal sentencing guidelines that are found to be "presumptive" in nature.

127. Nichols v. United States, 114 S. Ct. 1921, 1928 (1994).

128. These positions were taken by the dissenters in *Baldasar*. Baldasar v. Illinois, 446 U.S. 222, 231-32 (1980)(Powell, J., dissenting).